

Message

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**From:** Nalven, Heidi [Nalven.Heidi@epa.gov]  
**Sent:** 7/18/2019 1:39:43 PM  
**To:** Neugeboren, Steven [Neugeboren.Steven@epa.gov]; Wade, Alexis [Wade.Alexis@epa.gov]; Kupchan, Simma [Kupchan.Simma@epa.gov]  
**CC:** Schroer, Lee [schroer.lee@epa.gov]; Levine, MaryEllen [levine.maryellen@epa.gov]; McConkey, Diane [Mcconkey.Diane@epa.gov]; Wehling, Carrie [Wehling.Carrie@epa.gov]  
**Subject:** RE: 404 ASSUMPTION - reg review  
**Attachments:** 4324\_file\_Silva\_Reply\_on\_ESA\_Consultation.pdf

Attached is the Silva letter from 2010, which I think is our last public statement on this issue. In preparing this letter, I looked at the leg history relating to 404 (g),(h) (building on work Barbara Pace had done). I will send that document to Alexis and Simma. I will also send them my early memo that analyzes

**Ex. 5 Attorney Client (AC)**

# Ex. 5 Attorney Client (AC)

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**From:** Neugeboren, Steven  
**Sent:** Thursday, July 18, 2019 9:20 AM  
**To:** Wade, Alexis <Wade.Alexis@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>  
**Cc:** Nalven, Heidi <Nalven.Heidi@epa.gov>; Schroer, Lee <schroer.lee@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>; McConkey, Diane <Mcconkey.Diane@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>  
**Subject:** RE: 404 ASSUMPTION - reg review

Matt just called me to ask if we were going to discuss the issue today and I said yes. I've read the white paper and our old memo. Can you please give CCILO a heads up on this – send them the docs and also that we will talk about at reg review if they can join at some point. Matt will be there the whole time.

# Ex. 5 AC/DP

Steve Neugeboren  
Associate General Counsel for Water  
U.S. EPA  
1200 Pennsylvania Ave., NW  
Washington, DC 20460  
202 (564-5488)

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**From:** Wade, Alexis  
**Sent:** Wednesday, July 17, 2019 11:48 PM

**To:** Kupchan, Simma <[Kupchan.Simma@epa.gov](mailto:Kupchan.Simma@epa.gov)>; Neugeboren, Steven <[Neugeboren.Steven@epa.gov](mailto:Neugeboren.Steven@epa.gov)>

**Cc:** Nalven, Heidi <[Nalven.Heidi@epa.gov](mailto:Nalven.Heidi@epa.gov)>

**Subject:** RE: 404 ASSUMPTION

# Ex. 5 AC/DP

Alexis Wade  
Attorney-Adviser  
Water Law Office  
EPA Office of General Counsel  
(202) 564-3273

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**From:** Kupchan, Simma

**Sent:** Wednesday, July 17, 2019 11:17 PM

**To:** Neugeboren, Steven <[Neugeboren.Steven@epa.gov](mailto:Neugeboren.Steven@epa.gov)>

**Cc:** Wade, Alexis <[Wade.Alexis@epa.gov](mailto:Wade.Alexis@epa.gov)>; Nalven, Heidi <[Nalven.Heidi@epa.gov](mailto:Nalven.Heidi@epa.gov)>

**Subject:** Re: 404 ASSUMPTION

# Ex. 5 AC/DP

Thanks for your attention.

Simma

On Jul 17, 2019, at 7:04 PM, Neugeboren, Steven <[Neugeboren.Steven@epa.gov](mailto:Neugeboren.Steven@epa.gov)> wrote:

# Ex. 5 AC/DP

Steve Neugeboren  
Associate General Counsel for Water  
U.S. EPA  
1200 Pennsylvania Ave., NW  
Washington, DC 20460  
202 (564-5488)

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**From:** Kupchan, Simma  
**Sent:** Wednesday, July 17, 2019 5:17 PM  
**To:** Wade, Alexis <[Wade.Alexis@epa.gov](mailto:Wade.Alexis@epa.gov)>; Neugeboren, Steven <[Neugeboren.Steven@epa.gov](mailto:Neugeboren.Steven@epa.gov)>  
**Cc:** Nalven, Heidi <[Nalven.Heidi@epa.gov](mailto:Nalven.Heidi@epa.gov)>  
**Subject:** RE: 404 ASSUMPTION

(I assume we don't need to have developed a WLO view yet, as we just received it this afternoon, though defer to Steve.)

Simma Kupchan  
EPA Office of General Counsel  
Water Law Office  
WJC North Building # 7426Q  
202-564-3105

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**From:** Kupchan, Simma  
**Sent:** Wednesday, July 17, 2019 5:16 PM  
**To:** Wade, Alexis <[Wade.Alexis@epa.gov](mailto:Wade.Alexis@epa.gov)>; Neugeboren, Steven <[Neugeboren.Steven@epa.gov](mailto:Neugeboren.Steven@epa.gov)>  
**Cc:** Nalven, Heidi <[Nalven.Heidi@epa.gov](mailto:Nalven.Heidi@epa.gov)>  
**Subject:** RE: 404 ASSUMPTION

Looks like Matt just suggested doing so.

Simma Kupchan  
EPA Office of General Counsel  
Water Law Office  
WJC North Building # 7426Q  
202-564-3105

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**From:** Wade, Alexis  
**Sent:** Wednesday, July 17, 2019 5:15 PM  
**To:** Kupchan, Simma <[Kupchan.Simma@epa.gov](mailto:Kupchan.Simma@epa.gov)>; Neugeboren, Steven <[Neugeboren.Steven@epa.gov](mailto:Neugeboren.Steven@epa.gov)>  
**Cc:** Nalven, Heidi <[Nalven.Heidi@epa.gov](mailto:Nalven.Heidi@epa.gov)>  
**Subject:** RE: 404 ASSUMPTION

Are we discussing this at reg review?

Alexis Wade  
Attorney-Adviser

Water Law Office  
EPA Office of General Counsel  
(202) 564-3273

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**From:** Kupchan, Simma

**Sent:** Wednesday, July 17, 2019 5:11 PM

**To:** Neugeboren, Steven <[Neugeboren.Steven@epa.gov](mailto:Neugeboren.Steven@epa.gov)>; Wade, Alexis <[Wade.Alexis@epa.gov](mailto:Wade.Alexis@epa.gov)>

**Cc:** Nalven, Heidi <[Nalven.Heidi@epa.gov](mailto:Nalven.Heidi@epa.gov)>

**Subject:** RE: 404 ASSUMPTION

Looping in Alexis.

**Ex. 5 AC/DP**

**Ex. 5 AC/DP**

# Ex. 5 AC/DP

Simma Kupchan  
EPA Office of General Counsel  
Water Law Office  
WJC North Building # 7426Q  
202-564-3105

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**From:** Leopold, Matt (OGC)  
**Sent:** Wednesday, July 17, 2019 4:56 PM  
**To:** Fotouhi, David <[Fotouhi.David@epa.gov](mailto:Fotouhi.David@epa.gov)>; Kupchan, Simma <[Kupchan.Simma@epa.gov](mailto:Kupchan.Simma@epa.gov)>;  
Neugeboren, Steven <[Neugeboren.Steven@epa.gov](mailto:Neugeboren.Steven@epa.gov)>; Wehling, Carrie <[Wehling.Carrie@epa.gov](mailto:Wehling.Carrie@epa.gov)>  
**Subject:** FW: 404 ASSUMPTION

FYI, let's discuss on Thursday. Thanks

**Matthew Z. Leopold**  
General Counsel  
U.S. Environmental Protection Agency  
(202) 564-8040

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**From:** Valenstein, Noah <[Noah.Valenstein@dep.state.fl.us](mailto:Noah.Valenstein@dep.state.fl.us)>  
**Sent:** Wednesday, July 17, 2019 4:10 PM  
**To:** Leopold, Matt (OGC) <[Leopold.Matt@epa.gov](mailto:Leopold.Matt@epa.gov)>; Ross, David P <[ross.davidp@epa.gov](mailto:ross.davidp@epa.gov)>  
**Cc:** Walker, Mary <[walker.mary@epa.gov](mailto:walker.mary@epa.gov)>; Wolfe, Justin G. <[Justin.G.Wolfe@dep.state.fl.us](mailto:Justin.G.Wolfe@dep.state.fl.us)>;  
Wildeman, Anna <[wildeman.anna@epa.gov](mailto:wildeman.anna@epa.gov)>  
**Subject:** 404 ASSUMPTION

Dear Mr. Leopold and Mr. Ross:

The Florida Department of Environmental Protection greatly appreciates the tremendous efforts by the U.S. Environmental Protection Agency over the last two years to facilitate state assumption under Section 404 of the Clean Water Act. As you both know, Section 404 assumption can streamline permitting processes, reduce costs and duplication of effort by state and federal authorities, and better align the 404 program with other delegated programs. The Trump Administration should be applauded for striving – in the spirit of cooperative federalism and environmental protection – to make 404 assumption a reality for more states. For our part, FDEP is continuing to move forward with efforts to

apply for and obtain 404 assumption, which we hope to complete at the earliest possible opportunity. We are especially appreciative of the Administration's recent efforts to clarify the "assumable waters" issue. Looking ahead, FDEP remains committed to working closely with EPA, the U.S. Army Corps of Engineers, and other stakeholders on the state and federal rulemaking processes necessary to make 404 assumption a reality in Florida.

Though substantial progress in our state 404 application process has occurred, a significant barrier to effective Section 404 assumption remains. Specifically, where the Corps administers the 404 program, Section 7 of the Endangered Species Act embodies a streamlined and efficient process to ensure protection of endangered species, which may not be available when a state administers the 404 program. It is our understanding that other states have grappled with this ESA-based barrier to 404 assumption. With this concern in mind, FDEP recently retained outside counsel at Latham & Watkins and Baker Botts LLP to help FDEP evaluate the range of options under existing law for addressing and potentially resolving this concern. Based on that review, and as outlined in the enclosed white paper and summary paper, FDEP believes that EPA can and should engage in a one-time ESA Section 7 programmatic consultation with the Services in connection with the *initial review* of a state's 404 assumption application. This approach, which would bring state 404 permits within Section 7's exemption from take liability, is both lawful and good policy. Because of the unique statutory text and legislative history found in Section 404, as outlined in our white paper, this approach will not implicate any other EPA authority.

Obtaining 404 assumption for the State of Florida is one of my highest priorities for FDEP at this time. To that end, I would respectfully request an opportunity to meet with you both in person in Washington DC at your next earliest availability. I have asked Justin Wolfe, FDEP's General Counsel, to help arrange that meeting.

Thank you for your time and attention to this matter, and for your service to our nation at EPA.

Sincerely,

Noah Valenstein  
Secretary, Florida DEP

